United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1737

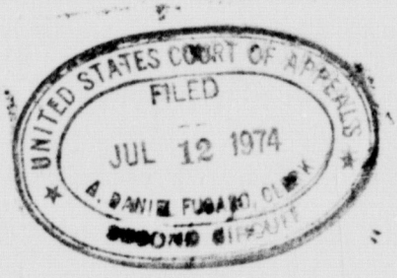
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- PHILIP TRAVERS, Appellant.	Docket No. 74-1737

B

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING A PETITION FOR WRIT OF ERROR CORAM NOBIS



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QUESTION PRESENTED

Whether the District Court erred in dismissing Travers' petition for writ of error coram nobis seeking vacature of his conviction and expungement of his record of that conviction on the basis of Maze v. United States, 414 U.S. 395 (1974).

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Milton J. Pollack) rendered May 13, 1974, denying appellant Travers' petition for a writ of error coram nobis.

The Legal Aid Society, Federal Defender Services Unit, was continued on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Philip Travers was convicted in the United States District Court for the Southern District of New York (The Honorable Milton Pollack) of twenty counts of mail fraud, in violation of 18 U.S.C. §§1341, 1342, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. §371. United States v. Travers, S.D.N.Y. Doc. No. 68 Cr. 1016. Travers was sentenced to two years' imprisonment on each count, the sentences to run concurrently.

On appeal, the judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit (431 F.2d 319 (1970)), and the Supreme Court denied certiorari

(400 U.S. 957 (1970)). Travers has completed serving his sentence.

The Government introduced evidence at trial that Travers and his co-defendants conspired to produce and distribute counterfeit Diners Club credit cards. Evidence was also presented to show that the defendant Pucci had used one of the counterfeit credit cards on numerous occasions.

The only mailings alleged by the Government in the substantive counts to bring Travers' conduct within the proscription of the mail fraud statute were the mailings of credit card invoices fron the merchants where Pucci had used his counterfeit credit card to the Diners Club offices and the subsequent mailings of notices from the Diners Club offices to the merchants. All these mailings took place after Pucci had fraudulently obtained goods or services using the counterfeit card. For purposes of the conspiracy count, the only mailings relied upon by the Government were the mailings of such invoices and notices which were expected to take place after the purchasers of the defendants' counterfeit credit cards used them to obtain goods or services.

The principal argument made on the appeal of Travers' conviction, and rejected by the Second Circuit, was that there had been no showing of a use of the mails for the purpose of executing a fraud.

PROCEEDINGS PURSUANT TO APPELLANT'S PETITION FOR WRIT OF ERROR CORAM NOBIS

On February 6, 1974 appellant Travers filed a petition for a writ of error coram nobis, requesting that his conviction be vacated and expunged from his record. This petition was based on the Supreme Court's recent decision in United States v. Maze, 414 United States 395 (1974) holding that mailings such as occurred in the present case, being both subsequent and merely incidental to the alleged fraud, were not mailings "for the purpose of executing the scheme" as are required to support a conviction under the mail fraud statute. (A copy of Travers' petition and accompanying memorandum of law are included in the record on appeal).

The government's memorandum of law in opposition to the petition conceded that "petitioner's use of the mails alleged and proved at trial would be insufficient [to support a conviction] under Maze. (See government's memorandum of law, included in the record on appeal, at 3).

The only ground given by the government for opposing the requested writ was that it felt that Maze should not be applied retroactively. (Id. at 3).

Travers responded by pointing out that since one element of the crime for which Travers had been convicted,

namely the use of the mails for the purpose of executing a fraudulent scheme, had never been proved, due process required that his conviction be vacated. (Travers' reply memorandum is included in the record on appeal).

On May 13, 1974, the Judge Pollack endorsed a memorandum on the back of Travers' petition, stating simply:

> 68 Crim 1016(MP)
>
> Since no adverse legal consequences are asserted herein, the necessary [sic] to ground district court jurisdiction is lacking. United States v. Plastikwear Fashions Inc., 368 F2d 845, 846 (2d Cir. 1966)(per curiam)
> Petition dismissed.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING TRAVERS' PETITION FOR WRIT OF ERROR CORAM NOBIS SEEKING VACATURE OF HIS CONVICTION AND EXPUNGEMENT OF THE RECORD OF THAT CONVICTION ON THE BASIS OF UNITED STATES v. MAZE, 414 U.S. 395 (1974).

A. The District Court erred in holding that Travers' criminal conviction and the record of that conviction were not "adverse legal consequences" sufficient to provide the basis for relief by writ of error coram nobis.

The relief sought by petitioner Travers in the District Court was for his conviction to be vacated and the record of that conviction expunged. The District Court dismissed the petition without reaching the merits of the claim, however, holding that Travers' criminal conviction had no "adverse legal consequences" to provide jurisdiction, presumably because Travers had already completed serving his sentence of incarceration.

Judge Pollack's finding that a criminal conviction has no legal consequences once the sentence is served is directly contrary to settled law on this issue as ex-

pressed by the Supreme Court and this and other Circuits.* In Carafas v. LaVallee, 391 U.S. 234, 237-38 (1968), the Supreme Court held that a criminal conviction, by itself, had adverse legal consequences sufficient to sustain a collateral attack even though the petitioner had already fully served his sentence:

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses;[4] he cannot serve as an official of a labor union for a specified period of time;[5] he cannot vote in any election in New York State;[6] he cannot serve as a juror.[7] Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." Fiswick v. United States, 329 U.S. 211, 222, 67 S.Ct. 224, 230, 91 L.Ed. 196 (1946). On account of these "collateral consequences,"[8] the case is not moot. Ginsberg v. New York, 390 U.S. 629, 633-634, n.2, 88 S.Ct. 1274, 1277-1278, 20 L.Ed.2d 195 (1968); Fiswick v. United States, supra, 329 U.S. at 222, n.10, 67 S.Ct., at 230; United States v. Morgan,

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*In fact, the District Court's finding is so clearly contrary to the law that the Government, in opposing Travers' petition in the District Court, did not even advocate that there were no adverse consequences arising from Travers' conviction.

346 U.S. 502, 512-513, 74 S.Ct. 247, 253, 98 L.Ed. 248 (1954).

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[4]E.g., New York Education Law, McKinney's Consol. Laws, c.16, §§6502, 6702; New York General Business Law, McKinney's Consol. Laws, c.20, §74, subd.2; New York Real Property Law, McKinney's Consol. Laws, c.50, §440-a; New York Alcoholic Beverage Control Law, McKinney's Consol. Laws, c.3-B, §126.

[5]73 Stat. 536, 29 U.S.C. §504.

[6]New York Education Law, McKinney's Consol. Laws, c.17, §152, subd.2.

[7]New York Judiciary Law, McKinney's Consol. Laws, c.30, §§596, 662.

[8]Undoubtedly there are others. See generally Note, Civil Disabilaties of Felons, 53 Va.L.Rev. 403 (1967).

In another post-incarceration collateral proceeding, United States v. Morgan, 346 U.S. 502, 512-13 (1954), the Court, in holding that adverse legal consequences existed to justify a collateral attack, stated:

> ... Although the term [of imprisonment] has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.*

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*Fiswick v. United States, 329 U.S. 211; Note, 59 Yale L.J. 786.

In Fiswick v. United States, supra, 329 U.S. at 222, the Court held that even after the sentence of incarceration had been served the defendant, in addition to other consequences of his conviction, would, solely by virtue of his record of conviction,

> ... carry through life the disability of a felon; and by reason of that fact he might lose certain civil rights. Thus Fenwick has a substantial stake in the judgment which survives the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot.

Finally, in United States v. Maze, supra, the very case on which petitioner Travers bases his petition in this proceeding, the sentence imposed pursuant to the challenged mail fraud conviction was to run concurrently with the sentence for a Dyer Act conviction, the validity of which had already been affirmed on appeal. Thus, as in the present proceeding, Maze's challenge to his mail fraud conviction, if successful, would have no effect on his incarceration, but rather would only expunge his record of that conviction. The Court of Appeals, recognizing the adverse consequences of a record of conviction, decided to consider Maze's challenge to his mail fraud conviction despite the concurrent sentence for the Dyer Act conviction, holding that "no considerations of judicial economy or efficiency have been

urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony." 468 F.2d 529, 536 n.6. The Supreme Court cited this determination with approval when the case was before it. United States v. Maze, supra, 414 U.S. at 397 n.1.

This and other Circuits have similarly held that a criminal conviction, by itself, has sufficient adverse legal consequences to justify a collateral proceeding seeking its vacature even after the term of incarceration has been fully served. Cline v. United States, 453 F.2d 873, 874 (5th Cir. 1972); United States v. Brough, 454 F.2d 370, 373 (7th Cir. 1971); Chavez v. United States, 447 F.2d 1373, 1374 (9th Cir. 1971); Brown v. Resor, 407 F.2d 281, 283 (5th Cir. 1969); Crow v. United States, 397 F.2d 284, 285 (10th Cir. 1968); Kyle v. United States, 388 F.2d 440 (2d Cir. 1961); see also United States v. Re, 372 F.2d 641, 643 n.1 (2d Cir.), cert. denied, 388 U.S. 912 (1967); United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963); Harris v. United States, 73 Civ. 4071 (S.D.N.Y. October 12, 1973)

(Weinfeld, J.). According to these cases, it is not necessary for a petitioner to cite a specific instance or instances where he has been prejudiced by the record of the challenged conviction.* Rather, the mere possibility that a felon will be deprived of voting rights and other civil rights because of his record of conviction is sufficient to warrant coram nobis relief. Kyle v. United States, supra; Brown v. Resor, supra; see also Carafas v. LaVallee, supra; United States v. Morgan, supra; Fiswick v. United States, supra; United States v. Brough, supra; Chavez v. United States, supra.

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*In fact, petitioner Travers has suffered substantial prejudice in addition to the deprivations of rights discussed in this section as a result of this conviction. Thus, he was unable to retain his job as a re-insurance underwriter or to obtain a similar job because he was unable to get bonded as a result of his conviction. His inability to get bonded has also prevented him from obtaining employment he sought as an accounting executive or as a sales representative in the real estate and pharmaceutical fields.

Mr. Travers is presently working as an operating engineer in the construction industry. When he was approached to run for the position of union auditor, he was prevented from doing so because of his conviction. Similarly, he has been unable to work in the union welfare office or hiring hall, both because of his inability to get bonded and because of the general disinclination to employ persons with criminal records.

Mr. Travers is presently considering moving to the midwest for health reasons. He anticipates that in the event of such a move he would encounter serious difficulties finding new employment because of his record of conviction.

The list of civil rights of which a felon is deprived as a result of his record of conviction is indeed substantial. In most states an individual with a record of a felony conviction is permanently disenfranchised (see, e.g., New York Election Law §152, subd.2-4; Fla. Const., Art.VI, §4; Ky. Const. §145; Conn. Gen. Stat. Ann. §9-45 (Supp. 1965): Mo. Ann. Stat. §111.060 (1966); Neb. Rev. Stat. §29-112 (1964); Tex. Election Code, Art. 5.01 (Supp. 1966); Va. Code Ann. §24-18 (1964)) and disqualified as a juror (see, e.g., New York Judiciary Law §§504, 596, 662; N.J.S.A. 2A:69-1). A felon is prohibited outright from engaging in a wide range of occupations (see, e.g., New York Judiciary Law §90(4); New York Gen. Bus. Law §§461, 467; New York Banking Law §369; New York Alco. Bev. Law §126; New York Bus. Law §74(2); New York Real Property Law §440-a; Ky. Rev. Stat. Ann. §322.050; New York S.C.P.A. §707; New York Unconsolidated Laws §§1051, 9918), and state licensing authorities are given discretion to exclude felons from yet other fields of vocational endeavor (see, e.g., New York Education Law §§6502, 6559, 6702, 6805, 7304, 7607; New York Public Health Law §3450; New York Agric. and Marketing Law §§90-e, 96-k-1). Federal law prohibits certain felons from serving as officials of a labor union for a specified period (29 U.S.C. §504) and excludes them from certain vocations (see, e.g., 10 U.S.C. §§3253(a), 8253(a); see generally Note, Civil Disabilities of Felons,

53 Va. L. Rev. 403 (1967).

The conviction being challenged in this proceeding is the only conviction on petitioner Travers' record. It is clear that although Travers has already served the term of incarceration, this criminal conviction and the record of this conviction subject him to substantial adverse legal consequences which are sufficient to provide a basis for relief by writ of error coram nobis. The District Court's finding to the contrary was error.*

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*The District Court's reliance on United States v. National Plastikwear Fashions Inc., 368 F.2d 845 (2d Cir. 1966) (per curiam), the only case it cited to support the finding of "no adverse legal consequences," was misplaced. First, the Plastikwear case involved a conviction for a misdemeanor, which of course does not subject the defendant to the deprivation of civil rights and other adverse legal consequences of a felony conviction discussed above. Moreover, in the Plastikwear case this Court found it unnecessary to consider petitioner's allegations of adverse legal consequences resulting from his record of criminal conviction because it found that the merits of the petitioner's challenge to his conviction were unfounded. Most significant, however, is the fact that the Plastikwear decision was rendered prior to the Supreme Court's decision in Carafas v. LaVallee, supra, which clearly holds that a record of criminal conviction produces sufficient adverse legal consequences to provide a basis for coram nobis relief. In fact, the Plastikwear decision relied for its finding of no adverse legal consequences solely on this Court's earlier decision in United States v. Roth, 283 F.2d 765 (2d Cir. 1960), which, in turn, relied on Parker v. Ellis, 362 U.S. 574 (1960), a case expressly overruled by the Supreme Court in the Carafas decision, 391 U.S. at 237.

B. Petitioner Travers is entitled to a writ of error coram nobis vacating and expunging the record of his conviction.

The Government's sole argument in opposition to Travers' petition in the District Court was that the Maze decision should not be applied retroactively to Travers' conviction. However, both the Supreme Court and this Circuit have already applied the Maze case retroactively in United States v. Osher, 485 F.2d 573 (2d Cir. 1973), vacated and remanded, ___ U.S. ___, Sup. Ct. Doc. No. 73-5761 (1974). In Osher, as in Travers' case, the defendant was convicted and his conviction affirmed by the Second Circuit before the Maze decision was rendered. After Maze, the Supreme Court vacated the Second Circuit's affirmance in Osher and remanded the case to this Court for further consideration in light of United States v. Maze, supra. This Court then reversed the judgment of conviction "in light of United States v. Maze, 414 U.S. ___ (1974)." (A copy of this Court's order is set forth in appellant's separate appendix as C).

Moreover, the application of Maze to this case is mandated by this Court's decision in United States v. Liguori, 438 F.2d 663 (2d Cir. 1971). In Liguori, as in the present proceeding, the petitioners had been convicted

and their convictions affirmed by the Second Circuit, based on its finding that sufficient evidence had been introduced to support those convictions. After the petitioners had completed their direct appeal, the Supreme Court, in an unrelated case, held that such evidence was in fact insufficient to support conviction for the crimes charged. The petitioners then sought and were granted orders in the District Court vacating their convictions. On appeal, this Court held that those orders were proper since conviction on a record which discloses no proof of an element of the crime charged "has a fatal constitutional taint for lack of due process of law." Id., at 669. See also United States v. Lopez, 414 F.2d 272 (2d Cir. 1969). Since Travers' conviction suffers from a similar constitutional taint, he is entitled to a similar order.

The Government's arguments before the District Court in the present proceeding as to why Maze should not be given retroactive application* are virtually identical to the arguments which this Court rejected in the Liguori case. In Liguori, as in the present proceeding, the Government argued that a Supreme Court decision should not be given retroactive application because of the prior "'reliance' of law enforcement officials [on what they believed

*See the Government's memorandum of law before the District Court, included as part of the record on appeal in this case.

the law to be] and the serious disruption of the administration of criminal justice that it is claimed would follow such a ruling" of retroactivity. Id., at 668. This Court held that such considerations must fall before the much more serious countervailing consideration that the Government had failed to introduce any evidence at trial of an element of the crime charged. Absent such evidence, a conviction violates constitutional due process requirements and must be vacated. Id., at 669; see also Vachon v. New Hampshire, 42 U.S.L.W. 3402 (Sup. Ct. January 14, 1974); Harris v. United States, 404 U.S. 1232, 1233 (1971) (chambers opinion of Douglas, J.); Thompson v. Louisville, 362 U.S. 199 (1960); Johnson v. Florida, 319 U.S. 596 (1968).

Moreover, the Supreme Court has repeatedly held that where one of its decisions goes to the integrity of the factfinding process, it must be given retroactive application. See, e.g., Linkletter v. Walker, 381 U.S. 618, 638-39 (1965); The Government's failure, in Maze and this case, to prove an element of the crime charged, is clearly central to the integrity of the factfinding process. United States v. Liguori, supra, 438 F.2d at 669.

Finally, the Government, while conceding that the evidence of mailing presented at Travers' trial would be insufficient to support a conviction if presented at a trial today, argued in the District Court that Travers' conviction should not be vacated because such evidence was

sufficient to support conviction at the time of Travers' trial. This argument was based on the assumption that the evidence was sufficient at the time of Travers' trial because this Court held in Travers' direct appeal that such evidence was sufficient. However, as the Supreme Court has subsequently held, in Maze v. United States, supra, this Court misinterpreted the mail fraud statute in making that determination.* Thus, the Government finds itself in the untenable position of arguing that if this Court had correctly interpreted the mail fraud statute in Travers' appeal, the evidence introduced at Travers' trial would have been insufficient to support Travers' conviction, but that since this Court misinterpreted that statute, this misinterpretation somehow rendered the evidence sufficient to support the conviction. Such an argument obviously lacks even the pretense of any merit.

The inescapable fact in this proceeding is that Travers was convicted of activities which the Supreme Court has held in Maze do not constitute a federal crime. In United States v. Madison, 74 Civ. 693 (S.D.N.Y. 1974), another recent application based on United States v. Maze, supra, the Government consented to, and Judge Metzner granted, vacature of the petitioner's conviction and the expunge-

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*The Supreme Court did not make "new" law in Maze; rather, it merely interpreted the mail fraud statute, holding that certain Circuits, including this Circuit, had misinterpreted that statute in cases such as Travers'.

ment of his record. Applying the precedents set in United States v. Maze, supra; United States v. Osher, supra; United States v. Madison, supra; and United States v. Liguori, supra, it is clear that similar relief should be granted in this case.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and an order should be entered vacating the conviction and expunging the record.

Respectfully submitted,

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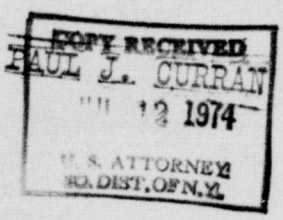
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